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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

- - - - -X  
UNITED STATES OF AMERICA 15-CR-179(G)  
  
vs.  
DONALD GARDNER, Buffalo, New York  
Defendant. August 9, 2018  
10:48 a.m.  
- - - - -X

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE FRANK P. GERACI, JR.  
UNITED STATES DISTRICT CHIEF JUDGE

JAMES P. KENNEDY, JR., ESQ.  
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Appearing on behalf of the Defendant  
  
ALSO PRESENT: Natalie Whitman, U.S. Probation Office  
  
COURT REPORTER: Christi A. Macri, FAPR-CRR  
Kenneth B. Keating Federal Building  
100 State Street, Room 2120  
Rochester, New York 14614

P R O C E E D I N G S

\* \* \*

(WHEREUPON, the defendant is present).

**THE CLERK:** Criminal action 2015-179, United States  
vs. Donald Gardner.

Counsel, please state your name and the party you  
represent for the record.

**MR. PENROSE:** Good morning, Your Honor, Douglas  
Penrose for the United States Government.

**MR. PASSAFIUME:** And Frank Passafiume for  
Mr. Gardner, Judge.

**THE COURT:** Good morning. Are you Donald Gardner?

**THE DEFENDANT:** Yes, I am.

**THE COURT:** This matter's on for sentencing. The  
Court does have the presentence report, and I have extensive  
filings actually from both sides, including a statement by the  
Government, a statement by the defendant, a number of letters  
on behalf of the defendant, and the Court's had an opportunity  
to review all those documents actually a couple of times. I'm  
fully aware of them.

Does the Government want to first be heard on any  
of the issues related to the filings? Do you have any  
objections to the presentence report?

**MR. PENROSE:** No, Your Honor.

**THE COURT:** Okay. Mr. Passafiume, do you have any

1 objections to the presentence report?

2 **MR. PASSAFIUME:** No, Judge.

3 **THE COURT:** Okay. Does the Government want to be  
4 heard on sentencing?

10:49:53AM 5 **MR. PENROSE:** Yes, Your Honor, thank you. Your  
6 Honor, this was a serious offense and the defendant's sentence  
7 should reflect this. The Government's position is that a  
8 guideline sentence of 120 months is appropriate and our  
9 written submissions fully set forth the reasons why we believe  
10:50:10AM 10 this to be the case.

11 I don't propose to go through those again in full,  
12 but what I would like to do is focus primarily on the  
13 defendant's conduct and also on the defendant's mental  
14 limitations.

10:50:24AM 15 The conduct that the defendant engaged in and was  
16 the basis for his plea was purposeful. He contacted the  
17 victim, he requested the sexually explicit pictures. It was  
18 deceitful. He had a picture on his Facebook profile of a  
19 young boy, and he refused to answer the phone when the victim  
10:50:42AM 20 tried to call.

21 Now, defense counsel takes issue with how the  
22 Government interprets those facts. But the most important  
23 fact is that the defendant repeatedly lied about his age,  
24 repeatedly saying that he was a 14-year-old boy.

10:50:57AM 25 Defense counsel says that the victim had an inkling

1 she was communicating with an adult, and I assume defense  
2 counsel is not insinuating that the victim is to blame for not  
3 knowing that the defendant was an adult, but what is relevant  
4 is the defendant's repeated statements that he was a  
10:51:16AM 5 14-year-old boy and his repeated denials that he was not an  
6 adult.

7 His conduct was persistent. He made repeated  
8 requests for sexually explicit pictures and he detailed  
9 exactly what he wanted. As the chats reflect, he made  
10:51:32AM 10 requests such as can you show me your asshole; open your ass  
11 cheeks, take pic; I will answer if you send me pic of your  
12 pussy open so I can see pussy hole; can I see your legs  
13 spread.

14 These are not the actions of someone who is simply  
10:51:47AM 15 curious. And at the end of the day, they result in the  
16 victimization of a 10-year-old girl.

17 The defendant's conduct while on pretrial release  
18 is also relevant, and here we have several violations of his  
19 release conditions, ultimately resulting in his being remanded  
10:52:07AM 20 to federal custody.

21 Defense correctly points out that some of his  
22 pretrial conduct, specifically the text messages he  
23 inadvertently sent to his supervisor were not violations of  
24 his conditions, they were communications between two adults.

10:52:27AM 25 But as both his supervising officer and Ms. Cindy

1 Barletta agreed, this was clearly high-risk behavior, and  
2 ultimately the defendant was remanded to federal custody on  
3 the basis of a violation of his release conditions.

4 And the basis for this was he went to a job  
10:52:50AM 5 interview and was supposed to only go to the job interview and  
6 instead went to two other locations.

7 Now, according to the presentence report, which the  
8 defense has adopted without objection, the defendant knew he  
9 should have called his supervising officer and alerted the  
10:53:10AM 10 officer to the change in plans. But he gave in to himself.  
11 Someone who gives in to himself and contradicts their release  
12 conditions is not someone who does what people in authority  
13 tell him to do, which is how the defense characterizes the  
14 defendant.

10:53:34AM 15 Now, there's certainly no dispute that the  
16 defendant has mental limitations and that they are genuine.  
17 The Government has never disputed this. But they did not  
18 prevent the defendant from engaging in the conduct that was  
19 the basis for his plea, it did not stop him from contacting  
10:53:54AM 20 two other minors and requesting nude pictures from them.

21 And briefly on that point, the Government's not  
22 asking the Court to infer anything with respect to Facebook  
23 chats with those two other minors. The Government is simply  
24 asking the Court to consider the statements made by these  
10:54:15AM 25 minors, statements in which they say that the defendant

1 requested nude pictures of them, statements which have not  
2 been contradicted. And if true, that conduct would be  
3 consistent with the conduct that forms the basis of the  
4 defendant's guilty plea.

10:54:36AM 5 Nevertheless, the defendant's mental limitations  
6 are certainly something that the Court should take into  
7 consideration in fashioning a sentence. And, again, the  
8 Government agrees with defense counsel that whatever the  
9 medical diagnosis is, whatever the correct terminology is,  
10:54:52AM 10 intellectual disability mild, intellectual mild severity, the  
11 defendant's impairments are significant. There's no question  
12 that all the professionals that evaluated the defendant agree.

13 Defense takes issue with the fact that the  
14 Government did not seek out an opportunity to learn firsthand  
10:55:13AM 15 of the defendant's limitations. However, I have a feeling  
16 that had we actually done so and arrived at perhaps a  
17 different opinion as to the defendant's limitations, that  
18 defense counsel -- defense counsel would perhaps rightly  
19 criticize us for having the opinion of an unqualified lay  
10:55:31AM 20 person.

21 Instead what the Government did was the Government  
22 relied on the professionals who evaluated the defendant and,  
23 in fact, went further. Not only do we -- we rely on the  
24 professionals, many of whom were retained by the defense, we  
10:55:46AM 25 went as far as adopt the framework defense counsel urged,

1 specifically evaluating the defendant's adaptive functioning  
2 skills. These types of skills include schooling, employment,  
3 romantic relations, whether an individual can properly care  
4 for himself or herself.

10:56:06AM 5 And it is the Government's view that the  
6 defendant, indeed, possesses many of these skills. He  
7 graduated high school, certainly with academic support; he has  
8 been able to hold gainful employment not only at Lee's Feed  
9 for a significant period of time, but at other businesses.

10:56:27AM 10 And I would note that there are several instances  
11 of him returning to the same employer which would seem to  
12 indicate that as the defendant stated, he left many jobs not  
13 because he was unable to meet the requirements of the job, but  
14 rather because he wanted a job with more hours or closer to  
10:56:45AM 15 home or that paid more.

16 The defendant has had several romantic  
17 relationships, at least one of which was serious enough he  
18 lived with his girlfriend at the time.

19 And he has also been able to properly take care of  
10:57:01AM 20 his personal needs while incarcerated.

21 On this basis the Government concludes and is  
22 joined in that conclusion by Drs. Cervantes and Heffler and  
23 Schlessinger that the defendant does, in fact, have adaptive  
24 functioning skills. Dr. Cervantes and Dr. Heffler stated  
10:57:24AM 25 overall the defendant demonstrates good adaptive functioning.

1 Dr. Schlessinger similarly concluded that despite his  
2 intellectual limitations, the defendant exhibited adaptive  
3 functioning skills.

4 Very briefly I will address the treatment summary  
10:57:42AM 5 prepared by Ms. Cindy Barletta and I would just like to make  
6 clear that being new to the district and new to the  
7 U.S. Attorney's Office and, indeed, new to Buffalo, I am  
8 wholly unfamiliar with Ms. Barletta, her clientele, her prior  
9 reputation.

10:58:02AM 10 The basis of the Government's analysis is solely  
11 her treatment summary, which she submitted to this Court and  
12 in which she states that the defendant was not expected to  
13 provide any details regarding the circumstances of his conduct  
14 that gave rise to the plea.

10:58:22AM 15 And in the Government's view, that significantly  
16 impacts her ability to evaluate the defendant with respect to  
17 making a sentencing determination and what might be relevant  
18 for that determination.

19 I have no reason to doubt that she is an excellent  
10:58:39AM 20 counselor, but she was not given the benefit of all the  
21 factors that in the Government's opinion are relevant to  
22 determining a sentence.

23 So, in sum, we have a defendant who engaged in  
24 purposeful conduct, who sought out sexually explicit pictures  
10:59:01AM 25 from a 10-year-old girl. He made repeated requests and he was



1 ultimately successful in achieving his goal.

2 He certainly has mental limitations, but they  
3 didn't stop him from engaging in the conduct which form the  
4 basis of his plea, and the medical professionals who evaluated  
10:59:22AM 5 him all concluded that he despite his limitations, he does  
6 function quite well.

7 For that reason the defendant needs to be given a  
8 sentence that reflects his conduct and reflects his actions,  
9 and so the Government's position is further supported by its  
10:59:47AM 10 written submissions that a sentence of 120 months is  
11 appropriate.

12 Thank you.

13 **THE COURT:** Thank you very much. Mr. Passafiume.

14 **MR. PASSAFIUME:** Judge, thank you. And I apologize,  
10:59:57AM 15 I am very nervous right now because, you know, my mentors,  
16 Judge, guys like that in my life warned me about cases like  
17 this, and these cases are so unique that I will remember them  
18 for the rest of my career and my life and these are cases that  
19 become more than a case.

11:00:17AM 20 And I don't represent the defendant in  
21 U.S. vs. Donald Gardner, Jr. I represent Donnie; I represent  
22 his mom Carol that's back there; I represent his brother Doug  
23 that's back there; and I represent Donnie's late father Don,  
24 Senior.

11:00:29AM 25 And I'm nervous for them and I do hope I do this

1 right. I know that Donnie and his family are also terrified  
2 and nervous.

3 More importantly, I know that Donnie is truly  
4 remorseful for his conduct. And that remorse started way back  
11:00:43AM 5 when back in October of 2014 when he was first confronted by  
6 agents he admitted his involvement, he apologized and he  
7 promised not to do anything like that again.

8 The case wasn't indicted and he wasn't arrested  
9 until a year later, October 2015. And in that year period  
11:01:02AM 10 there's not a single allegation of inappropriate behavior or  
11 criminal conduct.

12 And through the pretrial counseling with  
13 Ms. Barletta, Donnie's come to realize how wrong his conduct  
14 was and how severe his crime is. He understands the proper  
11:01:20AM 15 boundaries and he knows not to cross them.

16 That's why he stands before the Court today, Judge,  
17 with his plea of guilty. And I do commend the Government for  
18 agreeing to this resolution that leaves sentencing completely  
19 up to Your Honor. There's no mandatory minimum, Your Honor  
11:01:37AM 20 has the full range of sentence possibilities, and that allows  
21 the Court to not only recognize the seriousness of this  
22 offense, but also Donnie's significant and severe intellectual  
23 disability.

24 His disability is both simple and complex, and I  
11:01:54AM 25 say that because of this: In its simplest form his aunt says

1 it best, Donnie's a really good kid. People that know Donnie  
2 well, like his family, his aunt, Ms. Perrin who has a letter  
3 to the Court, she's the Gardner family attorney, they all  
4 describe Donnie as child like.

11:02:15AM 5 Obviously, he's not a kid, he's a 43-year-old man,  
6 but he functions significantly under his age due to his  
7 intellectual disability.

8 Donnie's mom puts it best. Donnie talks a lot, but  
9 doesn't say a lot, just like a child. And in its complex  
11:02:35AM 10 form, Donnie has been diagnosed with low end borderline range  
11 of intellectual functioning, mild mental retardation,  
12 intellectual disability mild severity, borderline intellectual  
13 functioning, and these are all from the numerous mental health  
14 professionals that have evaluated Donnie, not just in this  
11:02:52AM 15 case, but over his lifetime because these limitations were  
16 evident at a very young age.

17 He did not learn to speak until 3, he was held back  
18 in the first grade, he was removed from general classes and  
19 placed in special education classes in the fourth grade, he  
11:03:08AM 20 attended BOCES in high school, but because he was still  
21 reading at a third grade level, he didn't complete the  
22 program.

23 In school he was referred to a couple evaluations,  
24 and Your Honor has them as part of the submissions. One is by  
11:03:24AM 25 this Dr. Lazaro. And Dr. Lazaro conducted this Wexler test,

1 which I'm sure Your Honor's familiar with, and Donnie scored a  
2 70. The average score for a normal functioning person is 100,  
3 and Donnie scored a 70. That's lower than scores of people  
4 that have Asperger's and autism spectrum disorder.

11:03:43AM 5 And of the findings that Dr. Lazaro made at that  
6 young age was that Donnie was deficient in practical  
7 reasoning, the ability to articulate socially accepted norms,  
8 arithmetic skills, concentration ability, attention span,  
9 verbal abstracting skills, the ability to perceive the  
11:04:02AM 10 correlations between objects and events, and the ability to  
11 differentiate between essential and non-essential details in  
12 his surroundings.

13 As a result, Dr. Lazaro first diagnosed Donnie to  
14 be low end borderline range of intellectual functioning with  
11:04:18AM 15 that 70 score. If he had a point less, a 69, he would be at  
16 the very bottom of the scale. He was just above in that low  
17 end borderline range. One point less, he's low end. There's  
18 no borderline.

19 Fast forward now to 30 years later, early in this  
11:04:35AM 20 case we did retain Dr. Rutter to evaluate Donnie. He  
21 diagnosed Donnie with mild mental retardation with significant  
22 intellectual and developmental deficits. This diagnosis  
23 causes severe difficulties in social perception and  
24 interaction.

11:04:52AM 25 And Dr. Rutter specifically opined that these

1 difficulties stemming directly from Donnie's disability  
2 contributed to this offense here.

3           Some of the language in Dr. Rutter's report and  
4 even Ms. Barletta who gave the treatment summary prior to Dr.  
11:05:11AM 5 Rutter's report raised questions of competency and that's why  
6 the defense, again with the blessing of the Government,  
7 retained Dr. Cervantes and Dr. Heffler to conduct strictly a  
8 competency evaluation. And the purpose of that evaluation was  
9 not to get into any in-depth diagnosis or treatment or  
11:05:26AM 10 anything like that. It was strictly because of competency.

11           And Dr. Heffler ultimately diagnosed Donnie with  
12 this intellectual disability mild severity.

13           When Donnie's bail was ultimately revoked, the --  
14 without objection from the Government, the defense requested  
11:05:45AM 15 this competency evaluation from the Bureau of Prisons. And a  
16 BOP doctor -- again, a BOP doctor diagnosed Donnie with  
17 borderline intellectual functioning, and said that Donnie  
18 clearly suffers from a genuine and significant intellectual  
19 and cognitive impairment.

11:06:04AM 20           So what does this all mean? What is mental  
21 retardation, intellectual disability, borderline functioning?  
22 It means that people with disabilities like Donnie have  
23 problems in every day adaptive functioning, judgment, and  
24 academic and occupational achievement. And, sadly, Donnie is  
11:06:25AM 25 deficient in all of these.

1           He's never lived alone, he does not have the  
2 ability to live independently. He relies on his mother for  
3 everything.

4           He struggles to maintain employment. After high  
11:06:39AM 5 school graduation he worked 23 jobs in ten years, all food  
6 service or labor jobs. He's never been asked to be a cashier  
7 or communicate with customers at any of these jobs. He was  
8 let go from all of these jobs because he couldn't meet work  
9 standards. Not because of enough hours, that's what you tell  
11:06:57AM 10 somebody when you don't want to say you were fired -- I wasn't  
11 getting enough hours, so I left. He left because he could not  
12 meet those standards.

13           His longest job at Lee's Feed, this ten years, was  
14 a favor to his late father. His father was friends with the  
11:07:10AM 15 owner, was a customer of the owner, and that's literally the  
16 only reason Donnie was there that long. And soon after his  
17 father -- Donnie's father was diagnosed with lung cancer,  
18 Donnie was let go from that job as well.

19           At Lee's Feed, again, no cashier work, none of  
11:07:25AM 20 that. He loaded and unloaded trucks, he loaded customer cars.  
21 He didn't work customer service, he didn't work at a cash  
22 register and that's because Donnie does not handle finances of  
23 any kind. He doesn't work with money, doesn't deal with  
24 credit cards, doesn't know how they work, doesn't have a bank  
11:07:44AM 25 account, doesn't know how that works. His mother pays all the

1 bills. He is financially, socially and emotionally dependent  
2 on his mother.

3 And she has no real expectation that Donnie will be  
4 ever self-sufficient or able to support himself. Again, he's  
11:07:59AM 5 43 and his room in his house -- at his mom's house is still  
6 the same as it was 25, 30 years ago.

7 Donnie's reports on his romantic relationships are  
8 vague. His mother does clarify them; they've all been with  
9 women who are, too, intellectually disabled and they've been  
11:08:19AM 10 superficial in nature.

11 And like I previously explained, Judge, Donnie did  
12 not do well in school. He was in special education classes in  
13 elementary school; he was in BOCES in high school, but  
14 couldn't complete it. He was socially promoted throughout  
11:08:33AM 15 his high school tenure at all these schools in the '80's,  
16 which was common.

17 Dr. Rutter believes, and Ms. Barletta agrees, that  
18 Donnie does try to conceal these deficits with short replies  
19 and glibness. And I think Your Honor saw that firsthand  
11:08:52AM 20 during the plea colloquy.

21 Without knowing Donnie's full range of  
22 disabilities, it was kind of an awkward, odd plea colloquy if  
23 you remember way back when. But now knowing everything and  
24 placing that in context, I think Your Honor saw exactly what  
11:09:07AM 25 these doctors see.

1 Ms. Barletta, the treatment summary that she  
2 completed that the Government just referenced, was done very  
3 early on in this case. I spoke to her after the treatment  
4 summary. In fact, the treatment summary was done before we  
11:09:23AM 5 even retained our first expert.

6 After speaking with her and after the treatment  
7 summary was drafted, she was well aware of Donnie's case. She  
8 had the indictment, she even had the potential plea agreement,  
9 which is why we're here today.

11:09:39AM 10 And her letter that she drafted for Donnie's bail  
11 revocation, which is attached as a separate exhibit in the  
12 papers, she was well aware of everything when she drafted  
13 that. And that says Donnie is not a danger, that he would do  
14 well in the community, that he responds well to counseling.  
11:09:54AM 15 That was done all after-the-fact. That treatment summary was  
16 first thing in this case, it was the first domino.

17 Ms. Barletta agrees with Dr. Rutter and she does  
18 warn that Donnie tends to rub people the wrong way at times  
19 because of his socially inappropriate reactions. He doesn't  
11:10:10AM 20 think before he speaks and he does not process social cues  
21 well.

22 She found Donnie to be an extremely concrete  
23 thinker with limited cognitive and intellectual ability. She  
24 said that Donnie is not able to make well thought out  
11:10:26AM 25 decisions independently, he cannot problem solve, and he



1 cannot consider the consequences, which leads us to why he's  
2 here today, to the crime, Judge.

3           Donnie's -- I want to make this clear, his  
4 disability is not meant to excuse his conduct. I'm just  
11:10:43AM 5 trying to explain his conduct. I'm trying to explain why  
6 someone with no criminal history whatsoever, that is not a  
7 pedophile, that doesn't view or collect child pornography,  
8 that's never abused a child, that has no prior history of  
9 sexual offenses, let alone ones involving children, that has  
11:11:01AM 10 no prior offenses, let alone those like voyeurism or loitering  
11 which are seen as precursors to more serious sexual offenses,  
12 why someone like that engages in this conduct. Donnie's never  
13 been a part of any online clubs or chat rooms related to child  
14 pornography.

11:11:19AM 15           The poor criminal conduct here happened during the  
16 ten minute span with a victim who sent three pornographic  
17 images of herself to Donnie in this ten minute span. And  
18 there's one victim. I know there's talk of these other two,  
19 but there's no Facebook records relating -- backing up those  
11:11:34AM 20 other two statements, who are classmates of the victim.

21           Donnie never threatened nor coerced the victim to  
22 send the pictures . No physical contact was alleged nor was  
23 it even suggested by Donnie. In fact, he went at all costs to  
24 avoid contact with the victim.

11:11:53AM 25           There are no Facebook searches on his page or chat

1 rooms associated with child pornography. There was not a  
2 single picture of child pornography, aside from the three  
3 pictures here that he's pled guilty to, on any of the five  
4 devices seized by the Government and searched by the  
5 Government.

11:12:09AM

6 There's no evidence that Donnie attempted to tamper  
7 or alter his Facebook page and his Facebook account after the  
8 crime. And even though admittedly Donnie had a picture of a  
9 child on his Facebook profile image, defense forensic expert  
10 Jerry Grant, which I know Your Honor knows well, indicates  
11 that -- he says that Donnie was not specifically targeting  
12 underage girls with any of his communication based on  
13 Mr. Grant's thorough review of Donnie's entire Facebook page,  
14 his entire Facebook account.

11:12:24AM

15 And if Donnie was attempting to hide his identity,  
16 he was doing a bad job of it. His Facebook name was  
17 Donnie.Gardner.965, which everybody saw. There were pictures  
18 of himself on his Facebook page. There's communications on  
19 his page saying that he worked at Lee's Feed.

11:12:42AM

20 In fact, law enforcement used Donnie's Facebook  
21 page as a way to get to Donnie. That was the tool to locate  
22 Donnie and arrest him. He wasn't hiding in plain sight,  
23 Judge.

11:12:59AM

24 So how does this Court -- how is this Court assured  
25 that this conduct won't repeat itself? I think there is --

11:13:15AM

1 which almost makes this case unique, there is a track record  
2 to -- to assure the Court that this won't repeat itself.

3 First, again, like I mentioned, the year between  
4 the search warrant execution where Donnie gave the statement  
11:13:32AM 5 and was made aware of these charges and the arrest, there's no  
6 allegation of inappropriate behavior or criminal conduct,  
7 anything like that.

8 There's also this risk assessment by Dr. Rutter,  
9 and Dr. Rutter stated that Donnie does not exhibit symptoms  
11:13:50AM 10 consistent with a pedophile and that his risk of recidivism is  
11 low. He said that Donnie is not a danger to himself nor  
12 others.

13 Likewise, Ms. Barletta, who spent the most time  
14 with Donnie out of all these counselors, determined Donnie to  
11:14:06AM 15 be a low risk of committing a contact offense.

16 Both Dr. Rutter and Ms. Barletta said that Donnie  
17 is not a predator; that he does not present with anti-social  
18 personality disorder; they both believe that he would benefit  
19 most from sexual offense specific education; and that he can  
11:14:25AM 20 appropriately be monitored in his home. Not in jail, but in  
21 his home.

22 Dr. Schlessinger, the BOP doctor, also found that  
23 Donnie would benefit from cognitive remediation training and  
24 psychoeducation to target his specific deficits.

11:14:44AM 25 She was never asked to opine or give an opinion on

1 whether that could be done in a community or in jail. That  
2 was not her job. But she did agree with Dr. Rutter and she  
3 did agree with Ms. Barletta regarding treatment that would  
4 work for Donnie.

11:14:59AM 5 And she even went as far as to note, which I  
6 thought unique in this BOP evaluation, that Donnie's first  
7 time at counseling was at New Step with Ms. Barletta and that  
8 was his first experience ever with mental health counseling  
9 and that he enjoyed it, he enjoyed going, he truly did. He  
11:15:16AM 10 had a great rapport with Ms. Barletta.

11 And it ties into Dr. Schlessinger's opinion that  
12 Donnie's ability to think and reason in every day situations  
13 is impacted by his disability, and he is in need of support  
14 with communication, daily living skills, and socialization  
11:15:39AM 15 and that all can be done out of custody.

16 The best support for Donnie is living at home with  
17 his mother on that farm. He has the same room he grew up in,  
18 it looks exactly the same. There's drum sets, there's NASCAR  
19 stuff. He helps his mom around the farm with basic chores,  
11:15:56AM 20 basic repairs and farm duties.

21 His mom calls him an expert fence repairman for  
22 fixing a couple fences and -- around the property. He's  
23 learned to change a flat tire on a tractor from watching his  
24 father for 30 years.

11:16:14AM 25 Donnie is also very close to his brother Doug, who

1 is here. Doug lives close by, speaks with Donnie regularly.

2 And I know I talk about Donnie's mom Carol's health  
3 issues a little bit in my memo, and I'm going to make clear,  
4 if God forbid if something ever happened to Donnie's mom, Doug  
11:16:30AM 5 is right there to step up and be there for his brother.

6 Because Donnie, unfortunately, doesn't really have  
7 many real friends. His mom and his brother is all he has  
8 left. They're all that's left because his dad died at the  
9 time this case started where he was healthy one day, diagnosed  
11:16:46AM 10 with lung cancer and seven months later he passed, which tore  
11 Donnie up inside.

12 He idolized his father. He wanted to do everything  
13 his dad did. He still does. This is why he promised his dad  
14 right before he passed that he would take care of his mom, and  
11:17:01AM 15 now he's in this predicament and it's double the tearing up,  
16 Judge.

17 Donnie's mom, as I mentioned, has her own health  
18 issues, but she's a rock. She's a cancer survivor. She's  
19 here. She's had two hip surgeries, major eye surgery all in  
11:17:21AM 20 the past year, but she's here. She's unstoppable.

21 She's here, she's been at every court appearance  
22 and she knows every detail of Donnie's case. And she supports  
23 him, and she's committed to help Donnie return to the  
24 community as a law-abiding member of society, Judge.

11:17:37AM 25 In addition to these -- I'm almost done, and I

1 apologize, I know I'm going long -- but the Court also has  
2 before it this solid track record of 16 months on pretrial  
3 supervision before the bail revocation.

4 Donnie was violated for stopping at these two  
11:17:53AM 5 stores during a job interview. It was kind of a gray area  
6 condition where his probation officer said you have permission  
7 to go to see your counselor, Ms. Barletta; if you want to stop  
8 at the corner store for milk on the way back, you can do that.

9 For the job interview -- it was after Donnie's  
11:18:11AM 10 curfew, he went -- the manager at McDonald's there told him to  
11 come back to complete paperwork, it was the dinner rush, and  
12 Donnie stopped at these two stores. He never got permission.  
13 In the back of his mind he knew it, but he didn't quite know  
14 it, and that's the issue here, Judge.

11:18:26AM 15 With concrete black and white conditions and  
16 orders, he could follow. It's these gray area ones.

17 And his mother kinda says that, she says that maybe  
18 Donnie didn't fully understand. It was a gray area. He  
19 didn't really fully understand.

11:18:43AM 20 But the clearly defined conditions, and I point to  
21 the no internet, which is huge, he followed that. Probation  
22 examined Donnie's approved cell phone several times and not  
23 only were there no inappropriate images, no child pornography,  
24 nothing like that, but he didn't even access the internet, he  
11:19:00AM 25 didn't click one button to get on the internet.

1           When Donnie's friend left a video game system at  
2 the house that had internet access overnight and Probation  
3 found it the next day, again, where Donnie had the  
4 opportunity, he did not access the internet because that was a  
11:19:16AM 5 condition of his release. He followed that clear condition,  
6 that black and white condition carefully.

7           When Donnie understands these clear directives, he  
8 complies. Ms. Barletta, the counselor that saw him the most,  
9 concurs with that, Judge.

11:19:34AM 10           During this time on pretrial supervision Donnie  
11 regularly attended counseling, he did well in counseling, he  
12 maintained excellent communication with his counselor, with  
13 his probation officer, and me.

14           He did not view or obtain child pornography. He  
11:19:49AM 15 didn't even access the internet.

16           He can -- this all means he can be monitored  
17 appropriately in the community.

18           So, Judge, we are asking for this 24 month  
19 sentence, this two-year sentence, with lengthy supervision to  
11:20:02AM 20 follow. I think supervision properly addresses all the 3553  
21 factors.

22           Donnie's conviction, his sentence, the collateral  
23 consequences of his conviction, the sex offender registration  
24 classifications, all serve as a notice to Donnie to compel  
11:20:21AM 25 lawful behavior.

1           And he's also on notice for the potential  
2 consequences should he behave unlawfully. While on  
3 supervision he's going to have a laundry list of conditions,  
4 all these assessments, treatments, limitations on computer and  
11:20:33AM 5 internet, this electronic monitoring, which in the Northern  
6 District is GPS monitoring, it's not what you have here in the  
7 Western District. And he has limitation for being around kids.

8           Donnie can and will attend the programs suggested  
9 by Drs. Rutter, Schlessinger and that he excelled in with  
11:20:52AM 10 Ms. Barletta.

11           He's going to be required to register as a sex  
12 offender. That severely impacts his life on a daily basis.  
13 Anyone with access to a computer will know what he looks like,  
14 will know where he lives, know where he works, they'll know  
11:21:07AM 15 what car he drives.

16           Judge, incarceration can also be especially cruel  
17 and dangerous to people like Donnie with his disabilities,  
18 especially with those convicted of child pornography offenses.  
19 There are no special jails for him. He's not eligible for a  
11:21:24AM 20 psychiatric facility. And because it's a child pornography  
21 offense, he's not going to be eligible for any camp or minimum  
22 security prison.

23           With everything that I'm saying and what this boils  
24 down to, Judge, Donnie is not a predator, he does not pose a  
11:21:38AM 25 danger to the community. He can be appropriately monitored.



1           If the Court has any questions with Donnie's severe  
2 and significant disabilities, I urge the Court to bring in  
3 some of these counselors and hear testimony directly from  
4 them. You have all these reports. There is no question that  
11:21:54AM 5 this disability is severe, it is significant, and it is  
6 life-long.

7           I believe, Judge, and I submit to you that a  
8 two-year sentence for this isolated crime that occurred over a  
9 ten minute span that by all indications will never occur again  
11:22:08AM 10 is sufficient, but not greater than necessary.

11           Thank you, Judge.

12           **THE COURT:** Thank you very much, Mr. Passafiume.

13           Mr. Gardner, would you like to say anything to the  
14 Court?

11:22:20AM 15           **THE DEFENDANT:** I'd like to say I'm very sorry it  
16 happened and it will never happen again. I don't need the  
17 internet for nothing. I just need to get -- need to go home  
18 and help my mom on the farm because she's had, like he said,  
19 two hip surgeries and had her eyes taken care of so she can  
11:22:36AM 20 see better.

21           And right now she's got nobody but my brother once  
22 in a great, great while because he works nights that -- he's  
23 got a job he works nights at and once in a while he comes over  
24 and helps her out, but then he's got to go to work and there's  
11:22:48AM 25 days that he can't be there at all for her.

1           She has two cows and three horses that she tries to  
2 take care of, but she's not allowed to do anything on any of  
3 the equipment because of her hip surgery right now. They  
4 won't let her do nothing. The only thing she can do is drive  
11:23:04AM 5 her car and that's it.

6           **THE COURT:** Okay. Anything else?

7           **THE DEFENDANT:** Nope.

8           **THE COURT:** What did you learn from all this?

9           **THE DEFENDANT:** Hmm?

11:23:11AM 10          **THE COURT:** What did you learn from all this?

11          **THE DEFENDANT:** I learned that -- that I should  
12 never done the crime and -- the crime and the crime will never  
13 be done again and -- and that I don't like to be -- I don't  
14 like to be in here.

11:23:27AM 15          **THE COURT:** And how are you doing?

16          **THE DEFENDANT:** It's very scary.

17          **THE COURT:** How are you doing while in custody?

18          **THE DEFENDANT:** Doing good. Nobody's bothered --  
19 where they got me stationed right now, no one's bothered me.

11:23:37AM 20 I got a couple people that I hang out with in case there's a  
21 problem. But other than that, I get along real good.

22          **THE COURT:** Thank you. Anything else you want to  
23 say?

24          **THE DEFENDANT:** Nope. Thank you.

11:23:48AM 25          **THE COURT:** I know his mom and his brother is here

1 as well?

2 **MR. PASSAFIUME:** Yes, Judge.

3 **THE COURT:** Would his mother like to say anything?

4 **MR. PASSAFIUME:** I didn't ask her.

11:23:57AM 5 **THE COURT:** I know you didn't. I did.

6 **MS. GARDNER:** I'm a little short of hearing, sir.

7 **THE COURT:** If you could step up to that desk? Is  
8 that microphone on, Jane? That first desk?

9 **THE DEFENDANT:** Yes.

11:24:15AM 10 **MS. MARIANO:** She's going to sit, Your Honor.

11 **THE COURT:** That's fine. If you could, first of  
12 all, state your name for us?

13 **MS. GARDNER:** My name is Carol Gardner. I am  
14 Donald's mother.

11:24:27AM 15 **THE COURT:** Ms. Gardner, I know you weren't  
16 expecting this. I've been watching you sit back there. And I  
17 also reviewed the materials submitted by Mr. Passafiume, so  
18 I'm interested in if you have anything to say about this.

19 **MS. GARDNER:** Well, the only thing I can say is  
11:24:48AM 20 Donnie's a very good son. He works very hard for me. If he  
21 knows that I need something done, he does it before I even  
22 think to tell him. He's a very hard worker.

23 And I would really like him to come home. And I  
24 know from talking to him every two days on the phone and from  
11:25:11AM 25 his letters he misses his father terribly. He wants to be

1 home on the farm.

2 And this would never happen again. If he'd  
3 realized at the time, but Donnie -- Donnie doesn't have, say,  
4 friends. So anybody that smiles and is friendly to him, they  
11:25:33AM 5 become his friends right away.

6 And I think he's learned that he doesn't ever want  
7 to be in jail again. Thank you, sir.

8 **THE COURT:** Okay. Thank you, ma'am. Did the  
9 brother want to say anything?

11:25:50AM 10 **MS. GARDNER:** Doug, do you want to --

11 **MR. DOUG COX:** Yes, sir.

12 **THE COURT:** Okay. Just maybe switch positions?  
13 Again, if you could state your name?

14 **MR. DOUG COX:** My name is Douglas Cox. I'm Donnie's  
11:26:07AM 15 oldest brother. I really could use his help at home. I got  
16 my hands full. I work a lot, I try to help with the farm.  
17 Having him home would help big time.

18 I know he's sorry for what he did, and I know  
19 he's -- he's got everybody upset. But I think he learned his  
11:26:33AM 20 lesson and I'd like to see him come home.

21 **THE COURT:** Now, you work outside the farm; is that  
22 right?

23 **MR. DOUG COX:** Yes, sir. I work for Berry Global.  
24 It's a plastic plant. I work nights. So between that and  
11:26:49AM 25 trying to keep up with stuff at the farm, it's -- and keep up

1 with my mom, it's a handful.

2 **THE COURT:** Okay. Do you want to say anything else?

3 **MR. DOUG COX:** No. That's about it.

4 **THE COURT:** Okay, thank you. Again, I know you  
11:27:03AM 5 weren't expecting to talk, so I appreciate your willingness to  
6 do that.

7 **MR. DOUG COX:** Thank you, sir.

8 **THE COURT:** Thank you.

9 First of all, I want to commend both attorneys in  
11:27:11AM 10 this case. The Government obviously for their position. We  
11 have advocates here for different positions in this case and  
12 they both provide the Court with significant information to  
13 make an important decision.

14 Mr. Passafiume as well for the number of documents  
11:27:29AM 15 you submitted and the information. I'm in a much better  
16 position obviously to make a fair decision in this case, which  
17 is the job, to look at this case separately, based upon the  
18 individual facts of this case, and the individual before me  
19 and make a judgment.

11:27:48AM 20 Thank goodness the Supreme Court realized that when  
21 they made the guidelines what they are is guidelines and not  
22 mandatory because they give a court a starting point, but not  
23 mandating a particular sentence so the Court can use its  
24 discretion appropriately.

11:28:06AM 25 This is a difficult case. I think Probation and

1 everyone else has realized that the defendant pled guilty to  
2 possession of child pornography. He's 43 years of age. He  
3 did attend high school in a special education program. He is  
4 a United States citizen.

11:28:25AM 5 He has been in custody now for some 14 months based  
6 upon violating some conditions of his release and they were,  
7 quite frankly, some very technical violations regarding acting  
8 outside the curfew of the parameters of where he was to be on  
9 a particular occasion. It did not involve any criminal  
11:28:47AM 10 activity on his behalf.

11 This case involved the defendant having  
12 conversations over Facebook with minor individuals, one in  
13 particular which is the subject of this case in which the  
14 defendant did ask that minor, who turned out to be a  
11:29:07AM 15 ten-year-old girl, that he knew was a ten-year-old girl, to  
16 send him photographs of her in nude positions and in lewd  
17 positions. He indicated in that communication that he was 14  
18 years of age.

19 When confronted by law enforcement, he did admit  
11:29:28AM 20 his involvement in this criminal activity. Law enforcement  
21 did execute a search warrant, looked at a number of devices,  
22 and did find these three images on his Facebook account that  
23 he solicited from the victim in this case.

24 Based upon this charge, there's a base offense  
11:29:51AM 25 level of 32.

1           Because the victim was under the age of 12, there's  
2 a four level upward adjustment.

3           A two level upward adjustment for the use of a  
4 computer, being a phone.

11:30:05AM 5           A three level downward adjustment for his  
6 acceptance of responsibility, resulting in a total offense  
7 level of 35.

8           The defendant's criminal history category is a  
9 level I based upon a lack of any criminal record here  
11:30:20AM 10 whatsoever.

11           With a total offense level of 35 and a criminal  
12 history category of I, the sentencing range would be 168  
13 months to 210 months. However, based upon the nature of the  
14 charge, the maximum sentence is a ten year sentence or 120  
11:30:41AM 15 months.

16           The Government is advocating for that sentence.  
17 The defense is advocating for a sentence of 24 months.

18           The defendant was born in Syracuse. He lives with  
19 his parents on the farm until his father died of lung cancer  
11:30:59AM 20 at the age of 68.

21           He does not have a driver's license, he does not  
22 own a passport. As indicated, he did work on the farm helping  
23 his mother; had a variety of jobs throughout his lifetime,  
24 many of which he lost based upon some of the limitations which  
11:31:21AM 25 everyone agrees exist here.

1           The defendant has significant intellectual  
2 limitations. At times been deemed to be mildly mentally  
3 retarded, intellectually deficient, a range of different  
4 opinions regarding his limitations, but the consistency is  
11:31:41AM 5 that he is quite limited.

6           Based upon that was a special education student.  
7 Did make it through high school as a special education  
8 student.

9           He's been listed at the low end of a borderline  
11:31:53AM 10 range of functioning. And as I stated, mildly mentally  
11 retarded.

12           He did consume alcohol at the age of 16, but his  
13 use was very infrequent. There's no evidence of any substance  
14 abuse here whatsoever.

11:32:08AM 15           Now, the acts here were obviously serious as you  
16 understand and as pointed out by the Government. A  
17 ten-year-old girl was victimized in this case. And  
18 individuals who solicit photographs, lewd photographs from  
19 young children victimize them.

11:32:26AM 20           In this case luckily they were not shared with  
21 other individuals, but often they are shared through different  
22 networks and then the individual is victimized forever because  
23 it's never removed.

24           As I indicated, a search warrant was executed  
11:32:46AM 25 subsequent to the discovery of this incident, and a number of



1 devices were checked and they were found to not have materials  
2 on them.

3 While under supervision also the defendant, as  
4 stated, was in possession of a -- through a friend had a video  
11:33:07AM 5 capability for the internet, and that was checked by the  
6 Probation Office and found that the defendant did not access  
7 that.

8 There's been a range of opinions regarding his  
9 risk, but for the most part I think everyone's agreed that he  
11:33:22AM 10 would be a low risk to reoffend in the future.

11 He does lack the ability to really know social  
12 bounds, and he's impulsive in his functioning is questionable.  
13 He has been tested; full scale IQ at 75, which obviously would  
14 be quite limited.

11:33:46AM 15 He's worked as a stock clerk on occasion; did work  
16 for Lee's Feed for a number of years. But lost a number of  
17 jobs based upon his inability to conduct himself in an  
18 appropriate manner socially.

19 There's no evidence whatsoever that the defendant's  
11:34:06AM 20 had any contact with children, has no prior criminal history,  
21 has no history of substance abuse.

22 As I indicated, the evidence is that he is  
23 supportive of his mother, does work on the farm.

24 I was particularly impressed with the -- or I guess  
11:34:23AM 25 touched by the letter he wrote relating to his father. I

1 noticed that he did get emotional today when his father was  
2 mentioned; he was very close to his father, and his death I  
3 think had a severe impact on him.

4 But I think as Mr. Passafiume described that  
11:34:43AM 5 letter, if you read it you would have really thought it came  
6 from a ten or 12-year-old child as opposed to a 43-year-old  
7 man. I think that clearly demonstrates the limitations that  
8 this defendant has.

9 The Court has to consider the seriousness of the  
11:35:00AM 10 offense, which I've done. It is a serious matter.

11 Your history and character in determining the  
12 appropriate sentence. A sentence that's not greater than  
13 necessary to accomplish all the purposes of sentencing. To  
14 deter you from engaging in this activity in the future, and  
11:35:15AM 15 also deter others from engaging in this type of activity in  
16 the future.

17 Based upon all that the Court finds that a  
18 guideline sentence would not be appropriate in this case.  
19 That this does demand a variance regarding the sentence in  
11:35:34AM 20 this matter to be fair, and considering all the facts and  
21 circumstances of this case.

22 Based upon all that, I agree with Mr. Passafiume  
23 that a sentence of 24 months imprisonment is not greater than  
24 necessary to accomplish purposes of sentencing, but does send  
11:35:52AM 25 the right message. It does mean you'll be in custody for a

1 while longer, but I think that balances some punishment with  
2 the understanding that you'll be supervised after that in  
3 order to minimize any risk in the future.

4 So the Court does impose a period of 24 months to  
11:36:14AM 5 the Bureau of Prisons.

6 Any cost of incarceration is waived.

7 That's to be followed by a five year period of  
8 supervised release, with a number of conditions. And I have  
9 read the reports from individuals who have examined

11:36:29AM 10 Mr. Gardner, and I believe that if he is provided with -- as  
11 indicated by Mr. Passafiume -- concrete rules, he will follow  
12 those rules and I'm confident of that.

13 During the five year period of supervision, the  
14 defendant shall not commit any federal, state or local crimes.

11:36:50AM 15 He shall be prohibited from possessing any  
16 firearms, ammunition or dangerous devices.

17 He shall not possess any controlled substances  
18 unless prescribed by a physician.

19 He shall cooperate with the collection of a DNA  
11:37:03AM 20 sample.

21 Since this offense is not related to illegal  
22 substances and there's no history of substance abuse, any  
23 mandatory requirement for drug testing is waived.

24 The defendant shall not use or possess any computer  
11:37:19AM 25 data storage device or internet capable device unless he

1 participates in the computer and internet monitoring program  
2 unless authorized by the Court or the United States  
3 Probation Office.

4 He must provide U.S. Probation advanced notice of  
11:37:36AM 5 any computer automated service or connected device that will  
6 be used during this term of supervision.

7 Probation is authorized to install any applications  
8 to surveil any activity on any computer or connected devices.  
9 The defendant's required to pay the cost of any monitoring  
11:37:56AM 10 services.

11 Probation shall be notified by electronic  
12 transmission of any impermissible or suspicious activity or  
13 communication occurring on any such computer or connected  
14 devices.

11:38:11AM 15 The defendant must participate in a sex offense  
16 specific treatment program and follow rules and regulations of  
17 that program. Probation shall supervise the details of his  
18 participation in the program, including the selection of a  
19 provider and schedule. The defendant is not to leave  
11:38:29AM 20 treatment until completed or is ordered by the Court.

21 And if inpatient is required at any time, that must  
22 be ordered by the Court or consented to by the defendant.

23 He is required to contribute to the cost of any  
24 services rendered.

11:38:46AM 25 He's not to have any deliberate contact with any

1 child under 18 years of age, excluding his biological or  
2 adopted children, unless approved by the Probation Office or  
3 by the Court.

4 He shall not loiter within 100 feet of school  
11:39:01AM 5 yards, playgrounds, arcade or other places primarily used by  
6 children under the age of 18.

7 In order to monitor the defendant's compliance with  
8 not buying or subscribing to online services, the defendant  
9 shall provide Probation with access to any requested personal  
11:39:19AM 10 or business financial information.

11 He shall register with the state sex offender  
12 registration agency in any state where he resides, is  
13 employed, carries on a vocation, or is a student.

14 Probation is authorized to release the defendant's  
11:39:35AM 15 presentence report to the New York State Board of Examiners  
16 for classification purposes.

17 The defendant shall submit to a search of his  
18 person, property, vehicle or residence upon reasonable  
19 suspicion.

11:39:49AM 20 He shall submit to a polygraph computerized voice  
21 stress analyzer or other testing not to exceed twice in a  
22 calendar year, and an additional two retests per year as  
23 needed. The testing may include examination using the  
24 polygraph computerized voice stress analyzer or other similar  
11:40:09AM 25 device.

1 In this regard the defendant shall be deemed not to  
2 have waived his Fifth Amendment right by making any such  
3 statements. The results of any polygraph pretests and  
4 polygraph examinations may be disclosed to the United States  
11:40:29AM 5 Probation Office, but shall not be further disclosed without a  
6 court order.

7 The defendant again is required to contribute to  
8 the cost of services rendered.

9 Because the defendant does not have the ability to  
11:40:41AM 10 pay a fine, the Court is waiving any fine in this case.

11 Because he is indigent and he cannot afford to pay  
12 the mandatory \$5,000 Justice For Victims Trafficking Act  
13 assessment, the Court waives that as well.

14 He shall pay a special assessment of \$100, which  
11:40:59AM 15 shall be due immediately.

16 In addition, I'm going to order that the defendant  
17 be under electronic monitoring for a period of six months  
18 following his release and during his period of supervised  
19 release.

11:41:17AM 20 Anything else from Probation?

21 **MS. WHITMAN:** No, Your Honor.

22 **THE COURT:** Other counts to be dismissed?

23 **MR. PENROSE:** Yes, Your Honor. Your Honor, at this  
24 point the Government would move to dismiss the indictment.

11:41:44AM 25 **THE COURT:** Remaining counts of the indictment?

4                   **THE COURT:** Yes, based upon that, the indictment  
5 will be dismissed.

7 | **MR. PASSAFIUME:** No, Judge. Thank you.

1                   Your mother and brother, they need you home to help  
2 them out. I think you've got a very supportive family and  
3 that goes a long ways in the Court's determination to impose a  
4 sentence I decided in this case.

6 THE DEFENDANT: I won't.

7 THE COURT: Okay, good luck.

8 | **MR. PASSAFIUME:** Thank you.

9 | **THE DEFENDANT:** Thank you very much.

20 | **MR. PENROSE:** Thank you, Your Honor.

21 (WHEREUPON, proceedings adjourned at 11:42 a.m.)

\* \* \*

**CERTIFICATE OF REPORTER**

In accordance with 28, U.S.C., 753(b), I certify that these original notes are a true and correct record of proceedings in the United States District Court for the Western District of New York before the Honorable Frank P. Geraci, Jr. on August 9th, 2018.

S/ Christi A. Macri

Christi A. Macri, FAPR-CRR  
Official Court Reporter